

June XXXXX, 2008

ADVISORY OPINION 08-XXX¹

Whether members of the Tennessee Commission on Uniform Legislation are “officials in the legislative branch” as defined by Tenn. Code Ann. § 3-6-301(20), and whether persons communicating with members of the Tennessee Commission on Uniform Legislation for compensation must register as lobbyists as required by § 3-6-101(15)(A).

Requestor: Mark E. Nebergall, President of the Software Finance and Tax Executives Council.

QUESTIONS

Mr. Nebergall poses the following questions:

1. Are members of the Tennessee Commission on Uniform Legislation (“TCUL”) officials in the legislative branch (“Legislative Officials”) as defined by the Tennessee Ethics Reform Act (“Act”)?
2. If members of the TCUL are Legislative Officials as defined by the Act, must people who communicate with them for compensation register as lobbyists and comply with the Act’s lobbyist reporting requirements?

ANSWERS

1. Yes. Members of the TCUL are Legislative Officials as defined in Tenn. Code Ann. § 3-6-301(20).
2. If a person is paid to communicate with a member of the TCUL *for the purpose of influencing any legislative action or administrative action*,² then that person is a lobbyist and must register as a lobbyist and comply with the lobbyist reporting requirements of the Act.

FACTS

Mr. Nebergall is the president of SoFTEC. SoFTEC provides “public policy advocacy on finance and tax issues,” education to federal, state and international bodies on the “impact of their activities on software companies,” a “forum for the exchange of ideas between tax and financial

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² Tenn. Code Ann. § 3-6-101(15)(A).

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executives at software companies worldwide,” and promotion of the “best interests of its members through the development and communication of industry positions.”³

A brief survey of news sources finds that SoFTEC was launched in 1999 as a trade association.⁴ A portion of SoFTEC’s purpose was to “lobby Congress and conduct public awareness campaigns regarding finance and tax policy issues affecting the software industry.”⁵ SoFTEC is registered as the employer of a lobbyist (“Employer”) on the federal level, but not within the State of Tennessee.⁶

While it is not stated in Mr. Nebergall’s formal written request, Mr. Nebergall stated to Commission staff his purpose in contacting TCUL members would be to discuss and attempt to influence potential legislation and policy, as well as to simply converse, observe, and report on their activities.

Mr. Nebergall also provides almost no facts regarding the TCUL.⁷ However, according to the Tennessee Department of State’s list of 2007 Open Appointments, the TCUL is a three (3) member Commission which examines “subjects upon which uniformity of legislation in various states and territories of [the] union is desirable, but which are outside [the] jurisdiction of the United States Congress.” According to the same source, the TCUL also drafts “uniform laws for approval and adoption by several states.”⁸ TCUL members are also members of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).⁹

ANALYSIS

Tenn. Code Ann. § 3-6-301(20) defines “official in the legislative branch” as, in part, “any member of a commission established by and responsible to the general assembly or either house of the general assembly who takes legislative action.” The TCUL was established by the general assembly in

³ <http://www.softwarefinance.org/> (last visited May 30, 2008). Mr. Nebergall verified this information by phone.

⁴ <http://www.softwarefinance.org/press/softec.htm> (last visited May 30, 2008). Mr. Nebergall verified this information by phone.

⁵ <http://partners.nytimes.com/library/tech/99/10/cyber/capital/26capital.html> (last visited May 30, 2008); http://news.cnet.com/Software-firms-assemble-for-political-pull/2100-1040_3-231811.html. Mr. Nebergall verified this information by phone.

⁶ SoFTEC’s United States Senate Lobbying Disclosure can be found at http://www.senate.gov/pagelayout/legislative/b_three_sections_with_teasers/clientlist_page_S.htm (last visited May 30, 2008) and their United States House of Representatives Lobbying Disclosure can be found at <http://lobbyingdisclosure.house.gov/software.html?alpha=83> (last visited May 30, 2008).

⁷ As Mr. Nebergall is asking very basic questions regarding the organization and nature of the TCUL, this lack of facts is understandable.

⁸ Department of State Open Appointments Annual Report, 425 (2007).

⁹ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

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a legislative act¹⁰ and the TCUL's term is set by legislative act.¹¹ Finally, the TCUL is statutorily required to "keep a record of its transactions, and shall at the session of each general assembly make a report of its doings and of its recommendations to the general assembly."¹² Due to this requirement, the TCUL is responsible to the general assembly.

As the TCUL is both established by and responsible to the general assembly, TCUL members are "officials in the legislative branch" as defined by Tenn. Code Ann. § 3-6-301(20).

That the Governor appoints the individual TCUL members makes them no less "officials in the legislative branch." The governor appoints many offices which are not within the executive branch. To illustrate this point, consider that Tenn. Code Ann. § 17-2-119 gives the governor the power to appoint temporary judges until a contested election is settled. The fact that the Governor appoints a temporary judge makes the judge, however temporary, no less a member of the judiciary branch and thus subject to the rules and regulations thereof.

Likewise, that TCUL members are also members of the NCCUSL makes them no less Tennessee state officials. In fact, in order to be a member of NCCUSL, one must be a state agency commissioner, and thus each member of NCCUSL must also be a state official.¹³ Further, the state commissioners comprising the NCCUSL receive no salaries or fees for their work with the NCCUSL.¹⁴

Tenn. Code Ann. § 3-6-101(15)(A) defines "lobby" as "to communicate, directly or indirectly, with any official in the legislative branch or executive branch for the purpose of influencing any legislative action or administrative action." As discussed above, TCUL members are "officials in the legislative branch" as contemplated by the Act.¹⁵ As stated in Mr. Nebergall's request, the persons who would be communicating with the TCUL members would be compensated for their communication. A person who lobbies for compensation is a "lobbyist."¹⁶ Thus, the only remaining question is the purpose of the communication.

¹⁰ Tenn. Code Ann. §§ 4-9-101 - 4-9-104.

¹¹ Tenn. Code Ann. § 4-29-230(13). Further, the director of the office of legislative legal services, currently Ellen Tewes, or her designee, serves as an associate member in order to assist the TCUL in the performance of its duties. Tenn. Code Ann. § 4-9-101.

¹² Tenn. Code Ann. 4-9-103.

¹³ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008). There is no requirement that one be a state official located within any particular branch of state government, however. The requirement is simply that one be a commissioner on a state commission on uniform laws and that each commissioner be a member of a bar.

¹⁴ <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited May 30, 2008).

It is also worth noting that if they are lobbying for their own state agency, "officials in the executive branch" and "officials in the executive branch" may lobby without registration. Tenn. Code Ann. § 3-6-301(15)(D). Thus, TCUL commissioners could lobby on behalf of their own state agency without registration.

¹⁵ Tenn. Code Ann. § 3-6-301(20).

¹⁶ Tenn. Code Ann. § 3-6-301(15) and (17).

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Persons communicating with officials in the legislative or executive branches “for the purpose of influencing legislative action or administrative action,” and who are compensated for doing so, must comply with the lobbyist registration requirements.¹⁷ Since TCUL members are “officials in the legislative branch,” and the persons communicating with them would be compensated, these persons would have to register as lobbyists if they were communicating with TCUL members *for the purpose of influencing legislative action or administrative action*. Persons who communicate with TCUL members for reasons other than influencing legislative or administrative action, or persons who communicate with TCUL members without “compensation” as defined in the Act,¹⁸ need not register.

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¹⁷ See Advisory Opinion 07-10 (employees of a public relations firm may communicate with officials in the legislative branch or officials in the executive branch without registering as lobbyists so long as neither the public relations employee nor the client “recommend to the agency that they procure a service or a good, terminate an existing business relationship, postpone a decision, or communicate on any other matter that could ‘influence an administrative action.’”)

¹⁸ Tenn. Code Ann. §§ 3-6-301(7) and 3-6-307. It is worth noting that Tenn. Code Ann. § 3-6-307 allows persons who lobby less than ten (10) days per year, and whose compensation is limited solely to reimbursement for actual out-of-pocket expenses to lobby without registering.